

**Interagency Task Force  
on Employee  
Misclassification**

Tuesday, June 17, 2008  
Problem Resolution Office  
Lake Superior Room  
5015 S. Cedar St.  
Lansing, MI 48910

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**MINUTES:**

Task Force Attendees: Keith W. Cooley (Chair), Chris Peretto, Jack Finn, Craig Orr, Doug Schafer, Jack Nolish

The meeting was called to order at 2:00 p.m.

**1. Approve Minutes from the March 27 & May 20, 2008 Meetings**

There was one correction made on a Task Force member's name for the March 27<sup>th</sup> minutes. The minutes from March 27 and May 20, 2008 were approved by the committee.

**2. Task Force Hearings**

We made some plans for getting around the state with meetings starting the end of June into the fall. We want to coordinate with the Lt. Governor. The hearing dates are June 30<sup>th</sup> in the Detroit Metropolitan area, July 10<sup>th</sup> in Benton Harbor and September 16<sup>th</sup> in Lansing. We will also have meetings in Marquette, Traverse City and the Saginaw/Flint area. We have a location in mind for the Detroit Metropolitan area, but the availability has to be confirmed.

**Q** – Would the meetings be at 2:00 or at different times?

**A** – We want to stay around the same time for each meeting. We will try to keep them around 2:00.

**3. Report out from**

■ **Legal Subcommittee**

Jack Nolish/Jack Finn reported that the Legal Sub Committee met two times and discussed what the definition of an employee is. Wage and Hour and Worker's Comp have their own definitions of what a worker is. When the chair returns from leave, they will continue to work on the legislative interpretation of what an employee is. Director Cooley suggested we put that list of definitions for misclassification into a form that we can use and put into the report for the Governor.

■ **Education Subcommittee**

The Education Sub Committee met and teleconferenced with Norm Isotalo last Thursday to discuss the best way to educate the public. They want to educate the public, share information with other committees and share what the situation is currently and what the law is. They are trying to compile a list of major case laws. They want to work with other groups that may be interested in the area of Employee Misclassification. They may contact other groups and give them updates on the notes after the governor has had a chance to review them. They may also use Power Point presentations if the Task Force agrees and use them at the beginning of the meetings. The board thought it was a good idea. Jack Finn will get a sample together. Director Cooley suggested that the Consumers' Corner also be a used to get information out.

■ **Research Subcommittee**

Chris Peretto reported that the committee is getting the most recent information on employee misclassification, reviewing studies on what other states are doing to find out their best and worse

practices, working with the IRS, reviewing methods of enforcement and researching the underground economy. They are tentatively expecting to have their next meeting the week of July 7<sup>th</sup>.

Director Cooley requested a concise complete report from all three committees on where we have been and where we are going by the July meeting and also asked that people volunteer for one of the committees. Director Cooley said we need another subcommittee on Enforcement. We will need guidelines to share with our state boards on how we are going to move forward.

#### **4. MIOSHA's Link to Misclassification**

Bob Pawlowski reported that MIOSHA's definition of an employer is an entity that allows one or more persons to work. An employee is defined as someone who is allowed to work. There is a legal precedence. They are looking at the company who employs the individual to do the work. They look at who's directing the work and who is providing remuneration for the people doing the work.

**Q** – Is there a legal test that you do to determine who the responsible party is?

**A** – We look at who's directing the work, who's providing direction, and who is providing payment and a number of other things.

**Q** – Do you know if your statute has anything that would limit you once you identify one of these cases from notifying another state agency?

**A** – We can do that. Right now we are doing that with Workers Comp.

**Q** – Can you make referrals to other agencies?

**A** – Yes. We have a process in place where we have an optional information code.

**Q** – Would you be looking at whether they are following MIOSHA safety standards, and other things like whether or not they have workers comp?

**A** – If during an investigation something comes out, we would notify that agency. We don't actively seek out other site issues.

**Q** – Is this limited to companies that have a certain number of employees?

**A** – No, we look at all employers. There are some provisions where we cannot look at employers with less than 10 employees, and certain north American classification codes, but that has to do with federal funding.

**Q** – Do you get complaints from workers on the site?

**A** – Yes, and when we do we make referrals to other agencies.

**Q** – Knowing what you know, what is your take on misclassification?

**A** – From MIOSHA's prospective it is a problem on occasion. Bob Pawlowski said he would be interested in joining the Enforcement Subcommittee.

#### **5. Discuss Ramifications of Misclassification and Tools for Enforcement**

- Chris Peretto, UIA reported they have several different entities that are affected. If somebody is unemployed and they have a 1099 they are not covered they are not eligible for unemployment insurance. From the employer's perspective, if they pay someone on a 1099 and not as an employee, they are saving all sorts of taxes. Employers are probably not paying workers comp, not paying into the Trust Fund. Other employers are affected because they are paying a larger amount because other businesses are not paying. What we do is if a person files a claim as a 1099 and there are no wages, we would have someone from the Field Audit unit go to that business and make a liability determination. It affects everyone in that situation. We do random audits and targeted audits where we get information from the IRS and tips from all over including from other employers.

**Q**– What are the penalties on something like that?

**A**- We have a statute that lets us go up to 4 times the amount of what they should have paid as a penalty, but we have to prove fraud and that it was intentional.

**Q**- How are you identifying the companies you mentioned you're investigating?

**A** - We get a lot of our information from the IRS. We are finding people who have been working as an employee are now being compensated under contract.

**Q** - Bart Carrigan, Associated General Contractors asked if the company arranged for the employee to lease or own a vehicle, is that person considered an independent contractor?

**A -** We have eight different items that we look at to try to determine if someone is an employee or an independent contractor.

- Jack Nolish, Director, Workers' Compensation, stated the definition of an employee is very broad. If a worker does not maintain a separate business, does not hold himself to render service to the public and does not employ other workers, he will be considered an employee. There are employers who say they are not employers but have a sub contractors and therefore don't need workers' comp or unemployment insurance. The information comes to us in a variety of ways and goes to the Compliance Division. Employers can be fined \$1,000 per day or punished by six months in jail through the AGs office and they can shut down their business. The other misclassification that goes on is between the insurance companies and employers. Underreporting of the number of employees goes on. It is a question of coverage or not. Employers can be fined, sanctioned or shut down. Workers' Compensation can go after someone personally. If you have suspicions about an employer's insurance coverage, you can go to the website [www.michigan.gov/wca](http://www.michigan.gov/wca) under insurance lookup.
- The Youth Employment Standard Act is easily defined. The Prevailing Wage Rate is where you find the greatest employee misclassification. The employer may sub contract out and the sub contractor may say everyone is an independent contractor but unfortunately there is very little enforcement. We don't have any penalties or enforcement actions at this time. The Payment of Wages and Fringe Benefit Act – if they find out, there are penalties and interest on that. The Minimum Wage and Overtime Law – There are penalties and provisions in that act we can enforce.  
**Q –** On the prevailing wage for electricians, we were told by Wage and Hour that they don't get into classifications. Can the new task force take care of things like that now?  
**A –** Wage and Hour doesn't have the authority to get into what type of work a job should be labeled as. There are jurisdictional issues.

Director Cooley said that issue may need to go to the governor.

- Craig Orr from DMB reported that Business Services provides services for the state including purchasing goods and services, managing vehicle fleet, print and graphics and mail and deliver services. They are impacted by misclassification in the area of contracts for products and services. Prevailing wages come into play when employees may not be represented appropriately in the labor market and not getting the appropriate prevailing wages. Our primary enforcement tool that we have in place is that the contracts require vendors provide documentation that they have the necessary insurance coverage. If they don't, the contract is not implemented.  
**Q –** Is there a requirement for a certified payroll?  
**A –** It's required if DMB makes the request. It is not something that is routinely requested.  
**Q –** Does the subcontractor have to register?  
**A –** Yes  
**Q –** What happens if the contract on the prevailing wage claims one or two employees and classifies eight or nine other people as sub contractors and don't include the others on the audit?  
**A –** If something like that is reported, it could be grounds for termination of the contract.  
**Comment –** In the Electrical Division, Public Act 217 requires you to hold a contractor's license, to be considered a contractor. That might help the Task Force.

Doug Schafer, Department of Treasury –If employers are paying employees under the table the potential tax implications include non-payment of Withholding Tax and Single Business Tax. If employers are paying employees under the table, it is likely the compensation is paid from unreported cash receipts, which could also mean the employer is also underpaying sales tax if a retail business, and their own individual income taxes.

If an individual is misclassified as an independent contractor, that person may be claiming various expenses for meals, mileage etc., on a Schedule C, that they are not entitled to claim, which results in underpayment of

income tax. If the individual is being paid cash, it is likely they are not reporting the cash wages on their individual income tax return.

The Tax Compliance Bureau enforces compliance to Michigan's Tax Statutes through its Large and Mid-size Business Division, Small Business and Special Teams Division, and the Discovery and Tax Enforcement Division.

We have a staff of 307 including 230 auditors that do compliance audits and projects. The Discovery and Tax Enforcement Division that uses both legacy data and third party information to identify taxpayers that are non-filers or tax under reporters. The penalties imposed for non-compliance vary from 10% of the tax liability to 100%.

**Q – New Michigan Business Tax –** What, if any, is the difference for employees? Are there any incentives to misclassify employees?

**A –** There are no incentives because compensation is not part of the tax base.

**Q –** With all the penalties for employers, is there a reward program?

**A –** No.

**Q –** Do you find a lot of companies are going bankrupt to avoid tax obligations?

**A –** The Revenue Act has provisions for both officer liability and successor liability that limits the opportunities to avoid payment of taxes.

**Q –** How are businesses selected?

**A –** We have a sophisticated selection system that analyzes all businesses for audit assignment every account is judged fairly.

## **6. Approval of Report Outline**

Director Cooley said we are on track to have the report to the governor. There is an outline on the back table. We won't be saying much more on it until we get the report done.

## **7. Misclassification in the News**

Norman Isotalo passed out a summary of articles regarding employee misclassification. Some of the articles dealt with legislation that has been introduced nationally and is intended to address the issue of properly classifying employees. Many of the articles contained information from other states. One article stated the teamsters endorse the program. Senator Obama has introduced legislation that is looking at the issue of misclassification.

## **8. Public Suggestions/Ideas/Comments**

**Q –** If the employee reports a 1099 is there a greater penalty on the employee or employer, or are they penalized equally?

**A –** If the employee declares wages and paid tax, there would not be a liability as long as they pay the taxes. 1099 wages do not qualify for unemployment, but it could raise an issue for the employer if they didn't report the wages.

**Comment:** Sometimes people don't understand they are supposed to report the taxes as an independent contractor. When someone finds out, enforcement is just as strong against the employee as the employer. There should be some way to look at the employee in a different light so they will come forward. There needs to be some type of whistle blower type protection for employees.

**Q –** Todd McCastle, Carpenters, is there a contact number for Discovery Tax Division for Treasury?

**A –** The number is (517) 636-4120. There is also a fraud line.

**Q –** Do you have a way to file a complaint yet through the Task Force?

**A –** Enforcement is taking place as we speak. You can always file a complaint. UIA has a fraud hotline on their web page that is also set up for the Task Force. The hotline number is (800) 822-1122. If you call that number, the information will be shared with the Task Force.

**Q –** When is it proper to use a 1099?

**A –** If you have a legitimate independent contract worker, i.e. sales people, real estate agents, insurance salesmen etc., it would make sense to use a 1099 because they represent multiple businesses. The state follows IRS guidelines.

**Q** – Does the IRS get SS8s?

**A** – We might get them because of our exchange of information.

**Q** – If a subcontractor pays an individual who then pays a crew, the main boss may get a tax bill for \$10,000 that really wasn't his wages. What happens then?

**A** – With an undocumented work force, we would have to follow the paper trail.

#### **9. Next Meeting Date and Location**

It was suggested that the next meeting be in September in conjunction with the Lansing Public Hearing.

**Q** – Will the July report be disseminated?

**A** – It will be posted on the web site. If you leave us your e-mail address, we will send you copy of the report.

The meeting was adjourned at 3:35 p.m.